

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LINWOOD CARE CENTER

and

CASE 04-RM-145463

1199 SEIU UNITED HEALTHCARE WORKERS EAST

**EMPLOYERS' ANSWER TO NOTICE TO SHOW CAUSE AND REQUEST FOR SUBSTITUTION OF
SUCCESSOR EMPLOYER AS PETITIONER IN INTEREST IN THIS MATTER**

Employers, CPL (Linwood) LLC d/b/a Linwood Care Center and its Successor, 201 New Road Operations, LLC d/b/a Linwood Care Center, by their legal representatives, in answer and opposition to the Notice to Show Cause issued on July 28, 2016, hereby answer, oppose and request the discharge of the proposed finding that the RM Petition that is the subject of this matter be found moot. The Notice should be discharged because the Board has previously ruled that such representational matters may continue with the successor employer substituted for the original petitioner; because this matter involves questions qualifying for the exception to mootness as capable of repetition and evading review; and, because this matter is interconnected with other pending matters before the Board as to which both Employers are parties and have an interest. In further opposition to the proposed dismissal, Employers state:

1. This matter is pending determination of a timely Request for Reconsideration submitted on June 10, 2016 which seeks *nunc pro tunc* consideration of previously concealed evidence of potential bias of the Regional Director, Dennis P. Walsh, who dismissed the Petition without holding an election.

2. To date, the Board has not issued a determination reflecting consideration of the effects of such bias on determinations made by the Regional Director, including the dismissal of the RM Petition in this matter, including in the case referred to in the pending reconsideration request, Case *04-RC-161246 (Devon Manor)*.
3. As noted in the pending Request for Reconsideration in this matter, Due Process requires determinations by an unbiased decision-maker, Williams v. Pennsylvania, 136 S.Ct. 1899 (2016); Marshall v. Jericho, Inc., 446 U.S. 238, 242 (1980); J.J. Cassone Bakery, Inc. v. NLRB, 554 F.3d 1041, 1044-1045 (D.C. Cir. 2009).
4. The unfair labor practices which provided the basis for the Regional Director's dismissal of this RM Petition have been brought against both the Employer that filed this RM Petition and 201 New Road Operations, LLC d/b/a Linwood Care Center, as its Successor Employer, in Case 04-CA-146362 et al., which matters are currently awaiting determination on exceptions filed by the parties after the hearing in those matters.
5. Consistent with the Board's practice to hold a successor employer liable to cure and correct unfair labor practices arising during the prior employer's operation of a facility; to hold a successor employer to continue to recognize and bargain with the union representative in place during the prior employer's operation; and, to add the successor employer as a party to a pending ULP matter, the Board previously has not dismissed a pending RM Petition after a change in ownership and has afforded substitute standing to the successor employer to vindicate the employee rights reflected in a pending related RM Petition after the ownership of the facility has

changed. *See: Jeld-Wen of Everett, Inc., 285 NLRB No. 19 (1987)* (Board found RC and RM representational matters not mooted by change in ownership and substituted new operator as successor to prior operator just as it had done in related ULP proceedings); and, the same should happen in this case.

6. This matter is also not moot because it is capable of repetition and evading review, because of the allegations of bias against a still sitting Regional Director whose related actions also touch pending matters involving both CPL (Linwood) LLC and its successor employer. *See: Turner v. Rogers, 564 U.S. 431 (2011)* (Matter is not moot where capable of repetition and evading review in matters involving same litigants).
7. In the Board's February 17, 2016 determination that Regional Director Dennis P. Walsh "properly dismissed the petition," the Board did not consider the effect of the allegations of bias on his determination, including his determination that an election could not be held as stipulated as permitted by Casehandling Manual Sections 11731.2 (Free Choice Possible Notwithstanding Charge) and 11731.6(c) and the availability of post-election remedies such as those in Ron Tirapelli Ford, Inc. v. NLRB, 987 F.2d 433 (7th Cir. 1993), later cited by the Board's February 17, 2016 decision in this matter. *See also: Levitz Furniture Co. of the Pacific, Inc., 333 NLRB 717 at FN57 (2001)*, in which the Board confirmed the Regional Director's discretion to proceed with elections even while ULP blocking charges are being investigated.

8. Also pending is a separate decertification petition filed by employees of Linwood Care Center, at Case 04-RD-157892, which the same Regional Director, Dennis P. Walsh, ordered held in abeyance by Order of August 18, 2015 and by Notice of August 19, 2015, pending the outcome of the unfair labor practices changes in Cases 04-CA-146362 et al. ; and, for which an Acting Regional Director (acting due to the recusal of Regional Director Dennis P. Walsh from the matter) has also determined, by Order of July 28, 2016 that any *St. Gobain Hearing* to determine whether that RD Petition was tainted by the alleged unfair labor practice be deferred until the Board has ruled on the exceptions filed after the hearing in the unfair labor practices matters.
9. From the date on which CPL (Linwood) LLC filed the RM Petition in this matter to the date on which this Answer is filed, the employees of Linwood Care Center have documented their desire for a new election relating to their representation for more than a year and a half without being allowed to exercise their right of self-determination through a new election. These continuing employee rights should be vindicated through substitution of the present employer as was done in *Jeld-Wen*.
10. In this RM Petition matter, the Union itself stipulated to an election.
11. The ALJ's determination in the related ULP matters (JD-27-16, April 5, 2016) requires the Employers to "maintain the status quo regarding wages, hours, and other working conditions until a collective bargaining has been signed or a legal impasse has been reached," to "promptly notify the Union of any disciplinary action taken

against any unit employee” and “to bargain with the Union, upon request, concerning disciplinary matters.”

12. Since the pending RM and RD Petitions affect the obligations of the Employers to deal with the Union to give effect to the employees’ freedom of choice, *see: Levitz Furniture of the Pacific, Inc.*, 333 NLRB 717, 720, 724 (2001) (“The Board has held that an employer violates Section 8(a)(2) by recognizing a union that lacks majority support or by continuing to recognize an incumbent union that it knows has lost majority support.”) (“Under Board law, if a union actually has lost majority support, the employer must cease recognizing it, both to give effect to the employees’ free choice and to avoid violating Section 8(a)(2) by continuing to recognize a minority union.”), the underlying questions they present continue to be ripe.

13. Since, as recognized in the Board’s February 17, 2016 determination, the RM Petition is subject to reinstatement, its dismissal as moot prior to the final determination of the related ULP matters and while reconsideration of the validity of its initial dismissal is pending before the Board on reconsideration related to questions of bias by the Regional Director, would be unfair and unreasonable and contrary to the Due Process rights of both the Employers and the employees.

WHEREFORE, both initial Petitioner, CPL (Linwood) LLC, and its successor employer, as recognized in related proceedings, request that the Board discharge the Notice to Show Cause and continue to determination of the pending Request for Reconsideration; recognize the substitution of 201 New Road Operations, LLC d/b/a Linwood Care Center

as the Petitioner in Interest in this matter; and, grant the relief requested in this matter to finally give the employees at the facility their rights under the Act.

Respectfully submitted,

/s/ Louis J. Capozzi, Jr.

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[Employers' Legal Representatives]

DATE: August 9, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of August 2016, a true and correct copy of the foregoing **EMPLOYERS' ANSWER TO NOTICE TO SHOW CAUSE AND REQUEST FOR**

SUBSTITUTION OF SUCCESSOR EMPLOYER AS PETITIONER IN INTEREST IN THIS MATTER

was served on the following by the method designated:

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DATE: August 9, 2016